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MICHAEL ROBAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5771

BERNARD FEINBERG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PRAYER

The petitioner, Bernard Feinberg, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit in this proceeding on September 12, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix "A" hereto. The opinion rendered by the District Court for the Northern District of Illinois, was published in 371 F. Supp. 1205 and appears in Appendix "C" hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 12, 1974. A timely petition for rehearing was denied on October 15, 1974, and this timely petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Because of the number and length of the statutes and other authorities involved, they are set forth in the Appendix attached hereto.

QUESTION PRESENTED

Does the Jencks Act prohibit pretrial disclosure to a defendant of the substance of his oral statements which will be relied upon by the Government to support the charges of the indictment?

STATEMENT OF THE CASE

The United States appealed to the Court of Appeals for the Seventh Circuit from an order, of District Judge Prentice Marshall of the Northern District of Illinois, suppressing evidence. The suppression order was entered because the Government refused to comply with the trial court's order requiring answers to certain particulars requested by the petitioner.

A Motion for Bill of Particulars pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure filed on petitioner's behalf requested, *inter alia*, the following:

> "5. Does the Government rely upon any oral statements of the defendant to support the charge in the several counts of the indictment?
>
> 6. If the answer to request No. 5 is in the affirmative, state with respect to each such statement, if there was more than one,
>
> "(a) The name and address of the person to whom the statement was made,
>
> "(b) The date on which the statement was made.
>
> * * * * * *
>
> "(d) The substance of the statement.
>
> * * * * * *
>
> "(g) Whether a written memorandum or verbatim transcript of the oral statement was made, and if so, whether the Government has possession of the memoranda or transcript."

The trial court ordered the Government to answer the particulars set forth above and the Government moved for reconsideration. The Motion for Reconsideration was

denied. The Government stated that it would not comply with the district court's order and would secure interlocutory review either by mandamus or pursuant to 18 U.S.C., Section 3731.

> "To facilitate review of these orders pursuant to 18 U.S.C., Section 3731 [the district court] exclude[d] from evidence and [denied] the Government the right to use at trial any statements made by the [petitioner] which are not disclosed pursuant to the views expressed herein." (App. "C", pp. 30A-31A).

In ruling on the validity of the trial court's order, the Court of Appeals for the Seventh Circuit affirmed the order in part and reversed in part. The Court of Appeals agreed that it was proper for the trial court to require the Government to provide the petitioner with particulars as to:

1. The name and address of the persons to whom the defendant made oral statements.
2. The dates on which the defendant made oral statements.
3. Whether or not a written memorandum or transcript of the oral statements was made, and, if so, whether the Government has possession of the memorandum or transcript.

The Court of Appeals reversed that part of the trial court's order which required the Government to provide the petitioner in advance of trial with the substance of his oral statements upon which the Government would rely to support the indictment at trial.

> "The suppression order is reversed insofar as it is based upon the Government's failure to furnish [petitioner] with the substance of his statements to prospective Government witnesses." (App. "A", p. 7A).

The United States has represented to counsel for petitioner that it will comply with that portion of the trial court's order which was affirmed by the Seventh Circuit. Accordingly, what is at issue here is whether or not the Court of Appeals erred in reversing the trial court's order requiring the Government to disclose to the petitioner the substance of his oral statements. It is noted that in entering the order the trial court stated:

> ". . . the defendant, however, is only entitled to his statements or the substance thereof. The substance of a Government witness' statement, unrelated to an alleged statement of the defendant, may be excised. Indeed, rather than display a pre-existing document, it is sufficient for these purposes that the Government, in narrative form, state the contents of defendant's alleged statements, the persons to whom the statements were made and the dates of the statements." (App. "C", pp. 13A-14A).[1]

The Court of Appeals grounded its ruling upon its view that:

> "the Jencks Act, incorporated by reference into Rule 16(b), prevents us from approving [the order] insofar as [it] require[s] the Government to produce before trial statements made by a [petitioner] to a prospective Government witness" (App. "A", p. 6A).

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1. It should also be noted that the trial court entered the same order in four cases. The Government chose to appeal in only two of those cases and complied with the order in the other two cases.

REASON FOR GRANTING THE WRIT

It Is Essential To The Administration Of Criminal Justice In The Federal Courts That Definitive Rules Be Enunciated Regarding The Propriety Of Pre-trial Disclosure To A Defendant Of The Substance Of His Oral Statements Which Will Be Relied Upon By The Government To Prove His Guilt At Trial.

A.

Broad Implications Of Question

Petitioner's request for a Bill of Particulars was couched in exactly the same language as that which was before this Court in *Will* v. *United States*, 389 U.S. 90, 93 n. 1. In *Will*, supra, the question which faced this Court was the propriety of a Writ of Mandamus issued by the Seventh Circuit to compel a district judge to vacate a pre-trial order in a criminal income tax case. This Court vacated the Writ, but did not reach the question of the validity of the trial court's order. The case at bar is a necessary extension of *Will* evoking a timely and compelling need for this Court to finally answer the underlying questions raised in *Will*.

While research has failed to reveal a foursquare conflict among the circuits now, as the trial court stated:

> "In arriving at this conclusion I am not without company. *United States* v. *Crisona*, 416 F. 2d 107, 114 (2d Cir. 1969); *United States* v. *Ahmad*, 53 F.R.D. 186 (M.D. Pa. 1971); see, also, *United States* v. *Bryant*, 142 U.S. App. D.C. 132, 439 F. 2d 642, 649 (1971) (statement made to "undercover" agent during course of crime); *United States* v. *Lubomski*, 277 F. Supp. 713 (N.D. Ill. 1967) (statement to I.R.S. agent during course of attempted bribery). In fact, the Bench

> Book for United States District Judges, published by the Federal Judicial Center, which I am encouraged to use, includes 'Discovery of all oral, written or recorded statements or memorandum of them made by defendant to investigating officers or third parties and in possession of the Government.' Par. 3(a), ch. 4.01.4 (emphasis added); see, also, Omnibus Pre-trial Proceedings by Hon. John W. Oliver, Western District of Missouri, 58 F. R. D. 270." (App. "C", p. 21A).

Two facets of the case are most striking. On the one hand district judges are encouraged in the interest of fairness, expeditiousness and the promotion of pleas to exercise their discretion toward granting pre-trial discovery to the defense. Yet the Circuit Court of Appeals erroneously states in its opinion that the district court has no discretion in this regard because the Jencks Act is a bar. In addition, the Court of Appeals by its decision condones a grossly unfair, discriminatory practice of the Government picking and choosing which defendants will receive vital information in advance of trial in order to defend themselves.

Unless the issue raised in this petition is conclusively resolved by this Court, every one of the thousands of criminal cases now pending and those which will be brought in the future in the federal courts will remain in an unsettled and confused state in this all-important area of pre-trial preparation.

While this Court does not favor interlocutory appeals in criminal cases, *Will* v. *United States*, 389 U.S. at 96, it is a certainty that pending resolution of this issue, a myriad of appeals will be forthcoming. Conflicts will develop between the various circuits requiring ultimate intervention by this Court. Failure to grant this Writ will only postpone the inevitable and will promote more appeals and delays.

B.

Scope Of Discretion Under Rule 7(f)

To deny or grant a bill of particulars and the extent thereof rests in the sound discretion of the trial court and trial court's decision will not be disturbed absent an abuse of discretion. *Wong Tai* v. *United States*, 273 U.S. 77. The historical purpose of granting a bill of particulars is to inform the defendant of the nature of the charge against him so as to enable him to prepare his defense and to avoid surprise at trial. *United States* v. *Martinez*, 466 F. 2d 679, 686 (5th Cir. 1972).

> "We do not understand the Government to argue that petitioner was in any sense without jurisdiction to order it to file a bill of particulars. Suffice it to note that Rule 7(f) of the Federal Rules of Criminal Procedure specifically empowers the trial court to direct the filing of a bill of particulars, and that federal trial courts have always had very broad discretion in ruling upon requests for such bills. *Will* v. *United States*, 389 U.S. 99 (Citations omitted).

The record conclusively shows that the trial court was extremely selective in granting discovery, particulars and disclosure of evidence as requested by the petitioner. The trial judge, being fully conversant with the record in the instant case and in anticipation of providing the petitioner a fair trial, ordered what he deemed to be necessary particulars. His order was a proper exercise of discretion.

> ". . . it is one thing to say that a trial court does not abuse its discretion when it denies [certain pre-trial] disclosure. It is another thing to say that district courts lack the authority to require such disclosure in the exercise of that discretion. When the question has thus been squarely put, the authority has been found to exist." *United States* v. *Jackson*, 374 F. Supp. 168, 174 (N.D. Ill., 1974). (Citations omitted).

C.

Jencks Act Question

A fair analysis of the order vis-a-vis the Jencks Act can only lead to the conclusion that there is no conflict between the particulars the Government was ordered to supply to the petitioner and the proscription of the Jencks Act. The Jencks Act permits a defendant to view and utilize for cross examination purposes a Government witness' "statement" related to the subject matter of his testimony.

The Government was not ordered to produce memoranda or transcripts, i.e., the actual 3500 statement, or to reproduce verbatim portions thereof. The trial court merely ordered the Government to inform the petitioner of the *substance of his oral statements* — they were not ordered to produce the statements of prospective witnesses. All that the petitioner sought under Rule 7(f), Federal Rules of Criminal Procedure, and that which the trial court ordered the Government to produce, was factual information which would apprise him of the substance and circumstances of his oral statements upon which the Government relies to support the indictment.

It is respectfully submitted that the Court of Appeals erred in holding that the Jencks Act bars disclosure to the petitioner of the substance of oral statements made by him. The cases relied upon by by the Court of Appeals[2]

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2. *United States* v. *Wilkerson*, 456 F. 2d 57, 61 (6th Cir., 1972); *United States* v. *Kenny*, 462 F. 2d 1205, 1212 (3rd Cir. 1972); *United States* v. *Dorfman*, 53 F.R.D. 477, 479 (S.D. N.Y. 1971), aff'd 470 F. 2d 246 (2d Cir. 1972) (App. "A", pp. 4A-5A).

are inapposite to the facts in the case at bar. In all of those cases what was sought by the defendants and denied by the respective Courts on Jencks Act grounds were 3500 statements. Petitioner in the case at bar clearly was not seeking 3500 statements.

The trial court properly recognized that in "intent crimes"[3] guilt or innocence could well turn on the credibility the jury ascribes to statements of the petitioner. Thus, in the exercise of sound judicial discretion the trial court deemed it necessary that the petitioner in his pretrial preparation be apprised of the substance of his alleged oral statements in order to properly prepare for and defend his case.[4]

The Jencks Act bar can be applied only to statements as defined in Section 3500(e). That subsection provides:

> "(e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical, or oth-

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3. Petitioner is charged with violations of 18 U.S.C. Section 1341 by use of the mails in furtherance of a scheme to defraud the citizens of Cook County, Illinois of taxes on certain real properties located in the County. The indictment was returned in May of 1973 and covered events occurring in late 1971 and early 1972.

4. "The Government [stated] in open court that its case against [petitioner] rests largely on statements allegedly made by him." (App. "C", p. 13A).

> er recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." 18 U.S.C. Section 3500(e).

The "statements" defined in this subsection are the written documents and audio reproductions that are covered in the proscription of Section 3500(a). The substance of oral statements of a petitioner do not fall within this definition.

An interviewee's version of oral statements made by the petitioner are only a part[5] of the 3500 statement (assuming that person is a witness and testifies) and, depending upon the individual 3500 statement, could be a minor part. The fact that the petitioner's oral statements are recorded or transcribed by a Government agent interviewing the person reciting the alleged statements makes them nonetheless the petitioner's oral statements. Hence, there is no conflict between the District Court's Order and the Jencks Act.

Moreover, Rule 16(b) is not a bar to compliance with the trial court's order and reliance upon that rule is misplaced. The Court of Appeals states in its Opinion on page 3:

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5. Experience tells us that 3500 statements typically contain a great deal more than the interviewees' version of oral statements made to him by the defendant. What is likely to be contained in a composite of typical 3500 statements is the interviewees': (a) Observations of occurrences; (b) Recitations of conversations with persons other than the defendant; (c) Recitations of his actions; (d) Recitations of actions of others; (e) Conclusions; and (f) Opinions.

> "Rule 16 does not authorize the *discovery* or *inspection* . . ." (App. "A", p. 4A) (Emphasis added).

The trial court did not order *discovery* or *inspection* of 3500 statements.

The Seventh Circuit also stated that:

> "Prohibiting the disclosure ordered here until the witness has testified at trial also protects the integrity of the Government's evidence." (App. "A", p. 5A).

The integrity of the Government's evidence would not be affected by the disclosure which is sought here. *Will* v. *United States*, supra, clearly holds that this type of rationale should not be relied upon absent a showing of possible prejudice to the Government. There was no showing of prejudice in the case at bar, because none could be made.

As it now stands, the petitioner will be apprised in advance of trial who it is that the Government says he made oral statements to.[6] If he is, as he should be, made aware of the substance of his alleged oral statements, how can it possibly affect the integrity of the Government's case; particularly, if the petitioner does not take the stand. At

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6. This Honorable Court should recognize what is unfortunately a fact of life for defense counsel in most cases; that is, a tendency on the part of most potential Government witnesses to refuse to be interviewed by the defense prior to trial. In the unlikely event a person would agree to be interviewed, the probability of accurate recollection is minimal because of the long lapse of time. Hence mere knowledge of the identity of potential Government witnesses is, for all practical purposes, meaningless.

best, the petitioner will either deny or attempt to explain the meaning and circumstances of the oral statements. This is no more than he could do upon hearing the oral statements in the actual trial.

What he could not do, however, is conduct a meaningful investigation prior to trial so as to enable him to adequately prepare his defense. Examples will serve to illustrate cogent reasons which mandate the granting of the Writ.

By virtue of being advised prior to trial of the substance of his oral statements, petitioner's recollection would be refreshed so as to enable him to effectively assist defense counsel in preparing for the trial. Absent reasonably advance knowledge of his alleged oral statements, sudden recollection at trial by petitioner, if such recollection occurs at all, may well be too late to obtain evidence necessary to rebut the Government's allegations.

Assuming arguendo that petitioner made the same statement to two or more persons at the same time, those persons' versions of the statement could well differ. Should the Government choose to call only that person(s) as a witness whose testimony is compatible with the prosecution theory and not call the other person(s), the petitioner would be manifestly prejudiced if he did not have sufficient time to locate the other person(s) or otherwise preserve his testimony.

Disclosure of the substance of petitioner's oral statements which will be relied upon by the Government to support the indictment is necessary to insure that petitioner will receive a fair trial. There is no need for more examples or the expounding of platitudes to bring about the realization that the test of a fair trial is much broader

than what does or does not occur during the actual trial. The right and ability to fairly prepare for trial is at least on an equal plane with the right to fairly try a case. This is inherent in our concept of substantial justice. The trial court thus recognized its responsibility to do substantial justice by ordering the Government to inform the petitioner of facts so as to enable him to prepare his defense and avoid surprise at trial.

Nothing in Section 3500 or Rule 16(b) prohibits Government compliance with the trial court's order. On the contrary, basic fairness dictates that this Honorable Court hold that the Government must comply with the trial court's order.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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